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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHISOLM P. WIGHT,

Defendant and Appellant.

D051779

(Super. Ct. No. SCN222972)

APPEAL from a judgment of the Superior Court of San Diego County, Runston G. Maino, Judge. Affirmed as modified.

Chisolm P. Wight appeals a judgment entered following his jury conviction of making a criminal threat (Pen. Code, § 422).¹ On appeal, he contends the trial court erred by: (1) instructing with CALCRIM No. 362; (2) awarding attorney fees as part of his victim restitution obligation; (3) awarding restitution of the victim's economic losses

¹ All statutory references are to the Penal Code unless otherwise specified.

not reasonably related to the offense for which he was convicted; and (4) miscalculating the total amount of fines, fees, and restitution.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged Wight with burglary (§ 459), assault with a firearm (§ 245, subd. (a)(2)), and making a criminal threat (§ 422). The information also alleged that in committing those offenses Wight personally used a firearm (§ 12022.5, subd. (a)).

At trial, Kirk Perusich testified for the prosecution that in January 2007 he lived in a mobile home, Wight lived a few homes away, and they were friends. At about 11:00 a.m. on January 4, Perusich heard Wight's truck stop outside his home. He stepped outside and saw Wight approaching with his head down. Wight said they needed to talk and pushed Perusich back into the trailer. Wight asked: "What's this about you and my wife.?" Perusich answered that he did not know what Wight was talking about. Wight replied: "Don't lie to me, Motherf----r." Wight pulled a gun from his waistband and ordered Perusich to get on his knees and pray. He pointed the gun at Perusich's head and told him he was going to die. Perusich stood up and attempted to grab the gun. He heard the gun discharge. Wight stepped back and pistol whipped Perusich several times on his face and head. They continued to struggle and ended up outside the mobile home. Perusich broke free and ran to the home of a neighbor, who called 911. Perusich suffered an injury to his head that required seven staples.

Oceanside Police Officer George Darrah testified that at about 1:00 p.m. on January 4 Wight came to the police department and was arrested. Later that afternoon, Darrah interviewed Wight about the incident. A videotape of the interview was played

for the jury. Wight told police that he went to Perusich's home to fix his marriage. He told Perusich he needed to talk to him. Perusich seemed scared and stepped back. Wight began calmly addressing the situation regarding his wife. Wight explained what occurred next:

"[Perusich] came after me. I went for his hands. . . . I thought it was a knife, it was a gun. I took it from his hands and I hit him upside the head with it. He fell down and I told him, 'get up Kirk, get up, or I'll f-----g shoot you right now.' And then he got up and came at me again. [¶] I grabbed him. I put the gun, I don't know, the gun down on the floor, and I was by the door and we came outside. He was screaming, 'He's got a gun.' I said I don't got no f-----g gun and I was still trying to hit his ass. He ran across to the neighbor's house and I jumped in the car and I went[.]"

Wight stated the gun fired when he hit Perusich in the head with it. He told police the gun would still be in Perusich's home because he (Wight) dropped it on the kitchen floor.² He admitted owning a gun, but claimed he gave it to a cousin in Los Angeles.

Wight testified in his own defense. His description of the incident was similar to the description he gave police. He testified Perusich suddenly pulled a gun from behind his back. Wight grabbed the gun from Perusich and hit him in the head with it. Perusich then fell to the ground. Wight pointed the gun at Perusich's head and said, "I didn't shoot you, Kirk," and then told him: "Okay, I am going to go ahead and shoot you." Perusich jumped up, attacked him again, and reached for the gun. Wight hit Perusich a couple more times with the gun and then threw it onto the kitchen floor. Their fight continued

² Although police searched Perusich's mobile home after the incident, no gun was found.

outside and ended when Perusich ran off. Wight drove to Vili Makihele's house and explained the incident to him. Makihele then drove Wight to the police station, where he was arrested.

Makihele, Wight's cousin, testified for the defense, explaining Wight arrived at his house on January 4 after the incident. Wight told him he had thrown the gun outside the mobile home. Wight did not tell him he had thrown the gun in the kitchen.

The jury found Wight guilty of making a criminal threat (§ 422) and not guilty of burglary (§ 459). It further found Wight personally used a firearm in committing the section 422 offense. The jury could not reach a verdict on the assault charge and the trial court declared a mistrial on that count. The trial court suspended imposition of sentence and granted Wight formal probation for a period of five years subject to certain conditions of probation, including serving 365 days in local custody and paying certain fines, fees, and restitution.

Wight timely filed a notice of appeal.

DISCUSSION

I

Instruction with CALCRIM No. 362

Wight contends the trial court erred by instructing with CALCRIM No. 362.

A

The trial court instructed with CALCRIM No. 362 that:

"If the defendant, Chisolm Wight, made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show that he was

aware of his guilt of the crime, and you may consider it in determining his guilt. If you conclude that the defendant made the statement, it is up to you to decide [its] meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

Wight did not object to the instruction.

The People assert Wight has forfeited this contention on appeal by not timely objecting to the trial court's instruction with CALCRIM No. 362. To the extent the purported error did not affect Wight's substantial rights, we conclude Wight waived or forfeited his contention of instructional error by not timely objecting to that instruction. (Cf. *People v. Munoz* (1984) 157 Cal.App.3d 999, 1014.)

B

However, because Wight contends the purported instructional error affected his substantial rights, he may raise that contention on appeal despite the absence of a timely objection to that instruction. (§ 1259; *People v. Prieto* (2003) 30 Cal.4th 226, 247; *People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) Wight argues the trial court's instruction with CALCRIM No. 362, without any supporting evidence for that instruction, in effect lowered the prosecution's burden of proof and deprived him of his constitutional rights to due process and trial by a jury.

Instruction with CALCRIM No. 362 is proper when there is some evidence, if believed by the jury, to support a finding that the defendant knowingly made a false or misleading statement regarding the charged crime that may show he was aware of his guilt of the crime. (*People v. Rankin* (1992) 9 Cal.App.4th 430, 436 [regarding CALJIC No. 2.03]; cf. *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 102 [regarding

CALJIC Nos. 2.04 and 2.06].) For a trial court to properly instruct on a defendant's consciousness of guilt, "there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference." (*People v. Hannon* (1977) 19 Cal.3d 588, 597 [regarding CALJIC No. 2.06].) "The falsity of a defendant's pretrial statement may be shown by other evidence even when the pretrial statement is not inconsistent with defendant's testimony at trial." (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1103 [regarding CALJIC No. 2.03].) The falsity of a defendant's pretrial statements may be "proved by testimony of other witnesses." (*Ibid.*)

Whether any given set of facts supports the particular inference of consciousness of guilt is a question of law, which we independently decide. (*People v. Hannon, supra*, 19 Cal.3d at p. 597.) *People v. Duckett* (1984) 162 Cal.App.3d 1115 stated:

"In evaluating the evidence to determine whether a requested instruction should be given, the trial court should not measure its substantiality by weighing the credibility of the witnesses [or other evidence], as that task is exclusively for the jury. If the evidence is 'minimal and insubstantial,' however, the court need not instruct on its effect. [Citation.] Doubts as to the sufficiency of the evidence to warrant instructions should be resolved in favor of the accused. [Citation.]" (*Id.* at p. 1125.)

The record in this case shows there is some evidence to support a finding by the jury that Wight knowingly made false or misleading statements regarding the charged crime. (*People v. Hannon, supra*, 19 Cal.3d at p. 597.) Following his arrest, Wight told police that after Perusich pulled a gun, Wight took it away from him and later threw the gun on the kitchen floor. However, Wight's statements were contradicted, at least in part, by the testimonies of Makihele and Perusich. Makihele testified Wight told him after the

incident that he threw the gun outside the mobile home. Perusich testified *Wight* pulled the gun. Because there is some evidence to support a finding that Wight knowingly made false statements that Perusich, not he, pulled the gun and that he (Wight) threw the gun on the kitchen floor (and not outside), the trial court properly instructed with CALCRIM No. 362.

Although Wight cites *People v. Rubio* (1977) 71 Cal.App.3d 757 (disapproved on another ground in *People v. Freeman* (1978) 22 Cal.3d 434, 439) to support his argument that an instruction on consciousness of guilt cannot be given if the defendant's trial testimony is consistent with his pretrial statements but inconsistent with the prosecution's evidence, we, like *Edwards*, disagree with *Rubio*'s conclusion that an instruction on consciousness of guilt necessarily casts doubt on a defendant's credibility and singles out the defendant's testimony for particular scrutiny. (*People v. Edwards, supra*, 8 Cal.App.4th at pp. 1102-1103; see also *People v. Williams* (1995) 33 Cal.App.4th 467, 478.) The falsity of a defendant's pretrial statement may be shown by evidence other than the defendant's own trial testimony. In this case, the testimonies of Makihele and Perusich would have supported a jury finding that Wight knowingly made false statements regarding the charged crimes and an inference that Wight was conscious of his guilt. We are not persuaded by *Rubio* to reach a contrary result.

C

Wight argues the trial court's instruction with CALCRIM No. 362 in effect lowered the prosecution's burden of proof and deprived him of his state and federal constitutional rights to due process, a jury trial, and a presumption of innocence.

However, that argument appears to be merely a variation of the constitutional rights argument rejected by the California Supreme Court in *People v. Jackson* (1996) 13 Cal.4th 1164, in which the court concluded: "[T]hese consciousness-of-guilt instructions [e.g., CALJIC No. 2.03] did not improperly endorse the prosecution's theory or lessen its burden of proof." (*Id.* at p. 1224.) Accordingly, we are not persuaded by Wight's constitutional arguments.

D

Assuming arguendo the trial court erred by instructing with CALCRIM No. 362, we nevertheless conclude the error was harmless. First, that instruction would apply only if the jury first made the factual finding that Wight knowingly made a false or misleading statement regarding the charged crimes. Second, even were the jury to make that finding, the inference allowed by CALCRIM No. 362 is a permissive one, instructing: "If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance." The jury was *not* instructed to infer Wight was conscious of his guilt if the jury found he knowingly made a false or misleading statement. Rather, the jury was free to consider the meaning and importance of that factual finding. Furthermore, the jury was instructed Wight's guilt could not be proved solely by evidence he made a false or misleading statement. Based on those circumstances and our consideration of the entire record, we cannot conclude it is reasonably probable Wight would have obtained a more favorable verdict had the trial court not instructed with CALCRIM No. 362. (*People v. Rankin, supra*, 9 Cal.App.4th at p. 436 [regarding CALJIC No. 2.03]; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

II

Restitution of Perusich's Attorney Fees

Wight contends the trial court erred by requiring him, as a condition of his probation, to pay Perusich \$10,000 in attorney fees Perusich incurred in obtaining victim restitution.

A

Victims of crime in California have a constitutional and statutory right to receive full restitution from a defendant for economic loss suffered as a result of the defendant's criminal conduct. (Cal. Const., art. I, § 28, subd. (b); § 1202.4, subds. (a) & (f); *People v. Hamilton* (2003) 114 Cal.App.4th 932, 939.) Section 1202.4 provides in pertinent part:

"(a)(1) It is the intent of the Legislature that a victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime. [¶] . . . [¶]

"(f) . . . [I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court. . . . The court shall order full restitution unless it finds compelling and extraordinary reasons for not doing so, and states them on the record. . . . [¶] . . . [¶]

"(3) To the extent possible, *the restitution order* shall be prepared by the sentencing court, shall identify each victim and each loss to which it pertains, and *shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including*, but not limited to, all of the following: [¶] . . . [¶]

"(H) Actual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim."
(Italics added.)

We review a trial court's restitution order for abuse of discretion. (*People v. Mearns* (2002) 97 Cal.App.4th 493, 498-499.) An abuse of discretion will not be found if there is a factual or rational basis for the amount of restitution ordered. (*People v. Fortune* (2005) 129 Cal.App.4th 790, 794.) "[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.)

B

Following the incident, Perusich retained an attorney (David R. Thompson) to prosecute his claims against Wight for damages he sustained arising out of the incident. Perusich executed a retainer agreement in which he agreed to pay his attorney a minimum contingency fee of 30 percent of any and all amounts recovered "whether by way of settlement, judgment, or otherwise." Following Wight's conviction in this case, Perusich requested victim restitution of \$36,539.96 for medical bills, replacement of personal property, and repair of property damage he suffered as a result of Wight's criminal conduct and \$10,961.98 for attorney fees incurred pursuant to the contingency fee agreement.

In granting Wight probation, the trial court ordered as a condition of his probation that he pay restitution to Perusich in a total amount of \$46,539.96. In so doing, the trial court determined, as part of that restitution amount, Perusich was entitled to recover

\$10,000 in reasonable and necessary attorney fees incurred to obtain restitution from Wight.

C

We conclude the trial court did not abuse its discretion by ordering Wight to pay victim restitution to Perusich for economic losses he suffered, including attorney fees incurred to obtain that restitution. There is substantial evidence to support a finding by the court that Perusich retained an attorney to prosecute his claims against Wight and that he agreed to pay his attorney a minimum contingency fee of 30 percent of the amount recovered. Because the total amount of Perusich's direct losses was \$36,539.96 as calculated by the trial court in awarding him restitution, Perusich presumably was obligated to pay his attorney 30 percent of that amount, or \$10,961.98, as attorney fees. Accordingly, the trial court did not abuse its discretion in concluding \$10,000 was the amount of reasonable attorney fees Perusich incurred in obtaining restitution of his economic losses. Pursuant to section 1202.4, subdivision (f)(3)(H), the amount of the trial court's restitution order must be sufficient to fully reimburse Perusich for every economic loss incurred as a result of Wight's criminal conduct, including "[a]ctual and reasonable attorney's fees and other costs of collection accrued by a private entity on behalf of the victim." The trial court implicitly, and reasonably, concluded Perusich's attorney accrued fees and other costs in making collection efforts on Perusich's behalf, and Perusich was obligated to pay his attorney a contingency fee pursuant to the retainer agreement.

Contrary to Wight's argument, restitution of attorney fees is *not* limited to those cases in which a victim has actually filed a civil action to recover losses suffered as a result of a defendant's criminal conduct. Section 1202.4, subdivision (f)(3)(H) does not contain that limitation. To the extent Wight cites *People v. Fulton* (2003) 109 Cal.App.4th 876 as support for his argument, that case is factually inapposite because it involved attorney fees incurred by a victim in the course of settling a civil action filed against the defendant. (*Id.* at pp. 880-881.) *Fulton* did *not* hold that a civil action must be filed for a victim to obtain restitution of attorney fees under section 1202.4, subdivision (f)(3)(H). Absent any supporting authority or persuasive argument, we are not persuaded by Wight's argument for such a limitation. We conclude the trial court properly ordered Wight, as a condition of his probation, to pay Perusich a restitution amount that included \$10,000 in attorney fees incurred by Perusich to obtain restitution of economic losses suffered as a result of Wight's criminal conduct.

III

Restitution Reasonably Related to Wight's Offense

Wight contends the trial court erred by ordering him, as a condition of his probation, to pay restitution to Perusich because Perusich's economic losses were not reasonably related to Wight's criminal conviction for making a criminal threat.

A

"The sentencing court has broad discretion to determine whether an eligible defendant is suitable for probation and, if so, under what conditions. [Citations.]" (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120 (*Carbajal*)). "In granting probation,

courts have broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1. [Citations.]" (*Id.* at pp. 1120-1121.) Section 1203.1, subdivision (j), provides: "The court may impose and require . . . [such] reasonable [conditions] as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer" A sentencing court's broad discretion to impose reasonable conditions of probation "includes ordering restitution, if such a condition is reasonably related to the crime of which the defendant was convicted *or* to future criminality. [Citations.]"³ (*In re I.M.* (2005) 125 Cal.App.4th 1195, 1209, italics added.) However, an order of restitution is not improper merely because the defendant was not personally or immediately responsible for a victim's loss. (*Ibid.*)

Carbajal stated:

"California courts have long interpreted the trial courts' discretion to encompass the ordering of restitution as a condition of probation *even when the loss was not necessarily caused by the criminal conduct underlying the conviction*. Under certain circumstances, *restitution has been found proper where the loss was caused by related conduct not resulting in a conviction [citation], by conduct underlying dismissed and uncharged counts [citation], and by conduct resulting in an acquittal [citation]*." (*Carbajal, supra*, 10 Cal.4th at p. 1121, italics added.)

³ *Carbajal* stated: "[T]he restitution condition must be reasonably related either to the crime of which the defendant is convicted *or* to the goal of deterring future criminality." (*Carbajal, supra*, 10 Cal.4th at p. 1123, italics added.)

"[I]n determining whether restitution should be ordered as a condition of probation or for determining the amount of restitution to be ordered as a condition of probation[,] [w]e conclude proof by a preponderance of the evidence is the [applicable] standard [of proof]." (*People v. Baumann* (1985) 176 Cal.App.3d 67, 80.)

B

In granting Wight probation, the trial court imposed certain conditions of probation, including a requirement that he pay restitution to Perusich for his economic losses. In so doing, the court stated:

"I will make the following finding: that by a preponderance of the evidence, I believe that [Wight] hit [Perusich] with the gun, and when [Wight] had the gun in his possession, the gun fired. I don't believe [Perusich] was hit by a bullet from the gun. I believe the bullet went into the ceiling causing the damage that has to be paid for. The reason for [Perusich] going to the hospital and having the seven stitches was because of the striking of [Perusich] by [Wight]. This was not in lawful self-defense."

The court then determined the amount of restitution to be paid Perusich was \$46,539.96.

When the court asked Wight whether he understood and accepted those conditions of probation, Wight replied: "Yes, sir."

C

Considering the entire record, we conclude the trial court did not abuse its discretion by imposing restitution of Perusich's economic losses as a condition of Wight's probation. Although Perusich's economic losses apparently were not, as Wight argues, directly caused by his (Wight's) criminal offense of making a criminal threat (§ 422), those losses were nevertheless reasonably related to that criminal offense as the trial court

implicitly found. The court found Wight struck Perusich with the gun, causing him injuries that required treatment at a hospital. It also found Wight fired the gun into the ceiling, causing property damage. The court found Wight's actions were not done in lawful self-defense. It cannot reasonably be disputed those acts were done in the same course of conduct during which Wight made the criminal threat against Perusich. Therefore, the court's restitution order is reasonably related to Wight's criminal offense of making a criminal threat.⁴ (Cf. *Carbajal, supra*, 10 Cal.4th at pp. 1126-1127.) The trial court did not abuse its discretion by requiring him to pay restitution to Perusich as a condition of his (Wight's) probation. (*Id.* at pp. 1121-1127.)

Alternatively, the court's restitution order also serves to deter future criminality by Wight. (*Carbajal, supra*, 10 Cal.4th at p. 1123 ["[T]he restitution condition must be reasonably related either to the crime of which the defendant is convicted or to the goal of deterring future criminality."]; *In re I.M., supra*, 125 Cal.App.4th at p. 1209.) A requirement that Wight pay restitution for the economic losses Perusich suffered as a result of Wight's course of conduct (whether or not directly resulting from the criminal offense for which he was convicted) is an effective rehabilitative penalty or deterrence to

⁴ Contrary to Wight's argument, the causation of a victim's losses need not be undisputed by a defendant for them to be reasonably related to the defendant's criminal offense. Rather, as in this case, a finding by a preponderance of the evidence by a trial court that the defendant caused the victim's losses will suffice. (*People v. Baumann, supra*, 176 Cal.App.3d at p. 80.) Therefore, the mistrial on Wight's assault charge did not preclude the trial court from imposing restitution of Perusich's economic losses as a condition of Wight's probation. *People v. Scroggins* (1987) 191 Cal.App.3d 502, cited by Wight, is factually inapposite and does not persuade us to conclude otherwise.

future criminality because it presumably will require Wight to reflect on the harm his actions caused. (*People v. Rugamas* (2001) 93 Cal.App.4th 518, 522; *In re I.M.*, at p. 1210.) Because the restitution order was directly related to Wight's future criminality, we conclude the trial court did not abuse its discretion by requiring him to pay restitution to Perusich as a condition of his (Wight's) probation.⁵ (*In re I.M.*, *supra*, 125 Cal.App.4th at p. 1210.)

IV

Calculation of Total Amount of Fines, Fees, and Restitution

Wight contends, and the People concede, the trial court erred in calculating the total amount of fines, fees, and restitution to be \$47,580.94. Although Wight argues the record conflicts or is unclear regarding the individual component fine, fee, and restitution amounts imposed by the court, our review of the record shows there is no conflict. Rather, the record merely contains an error in summation of the total amount of the fines, fees, and restitution. As the People note, the trial court ordered Wight to pay as a condition of his probation: (1) a section 1465.7, subdivision (a), fine of \$680.00; (2) a section 1463.07 administrative screening fee of \$25.00; (3) a section 1465.8 court security fee of \$20.00; (4) a Government Code section 29550.1 criminal justice administration fee (booking fee) of \$154.00; (5) a section 1202.4, subdivision (b),

⁵ To the extent Wight alternatively argues the trial court's restitution order constituted an excessive fine in violation of the federal and state Constitutions, he does not carry his appellate burden to persuade us that a restitution probation condition is subject to the excessive fines clause. In any event, we are not persuaded the restitution order in this case is grossly disproportionate to the gravity of Wight's offense.

restitution fund fine of \$200.00; and (6) direct victim (i.e., Perusich) restitution of \$46,539.96.⁶ The correct total amount of those fines, fees, and restitution is \$47,618.96. Accordingly, the court's written probation order is incorrect to the extent it states the "TOTAL DUE" is \$47,580.94.

In imposing those fines and restitution, the trial court adopted the Probation Department's proposed order, with the exception of reducing to \$46,539.96 the amount of restitution to be paid to Perusich (presumably reflecting its reduction in the amount of Perusich's reasonable attorney fees to \$10,000 as discussed above). Although the trial court did, as Wight notes, refer at the hearing to a total of \$470 for fees or fines imposed other than the \$200 mandatory restitution fund fine, its express adoption of the Probation Department's proposed form of order at that hearing, together with its written probation order, refute Wight's assertion that there is a conflict regarding the individual amounts of fines, fees, and restitution imposed by the court. Because the individual amounts of fines, fees, and restitution required by the court add up to a total of \$47,618.96, that is the correct amount that should have been reflected in the court's written probation order. Rather than remanding the matter to the trial court to correct that simple mathematical error, we exercise our discretion to instead modify the judgment to reflect that correct total amount.

⁶ Although the trial court also imposed a section 1202.44 probation revocation restitution fine of \$200.00, it suspended that fine pending any future revocation of Wight's probation. Accordingly, we do not include that fine in the total amount to be paid by Wight as a condition of his probation.

DISPOSITION

The judgment is modified to show \$47,618.96 is the total amount of fines, fees, and restitution due as a condition of Wight's probation. As so modified, the judgment is affirmed.

McDONALD, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.